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No. _____

In The

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 1995

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QUESTIONS PRESENTED

1. In a diversity case, does federal law or state law govern the appellant's right to appeal a judgment after he successfully executes on and obtains satisfaction of the full judgment won in the district court?

2. Does an appellant's execution on and satisfaction in full of the judgment won in the district court moot the case and deprive the federal court of appeals of jurisdiction to entertain the appellant's appeal under Article III, Section 2, of the United States Constitution?

LIST OF PARTIES

Two parties involved at earlier stages of this litigation are not named as such in this Petition. Defendisk, Inc. was dismissed from the action before submission of the case to the jury. Grynberg Petroleum Company, although listed in the caption of the Tenth Circuit Court of Appeals as "a Colorado Corporation," is in fact a sole proprietorship owned and operated by Petitioner Jack J. Grynberg, and was referred to accordingly in the caption of the United States District Court, where the case was tried. (*See* Appendix B, *infra*, at B-1 and Appendix D, *infra*, at D-1.)

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Jack J. Grynberg respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, (Appendix, A, *infra*), is reported at 44 F.3d 1497 (10th Cir. 1995). The district court issued no opinions herein. The trial court's Second Amended Judgment and its Order of

Disbursement are reproduced at Appendices B and D, respectively.

JURISDICTION

The court of appeals entered its judgment on January 19, 1995. (Appendix A, *infra*, at A-1.) The order denying the petitions for rehearing entered February 16, 1995. (Appendix C, *infra*, at C-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

Article III, Section 2, of the Constitution of the United States provides, in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – . . . to controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

This litigation arose out of disputes over arrangements for the financing, development, production and marketing of a technique Respondents claim to have invented to protect computer software from unauthorized

copying. Generally, Respondents were to provide technical knowledge, while Petitioner would contribute financial backing and administrative support. The personal and business relationships of the parties began to deteriorate almost at the outset, resulting in open hostility. Litigation ensued in a Colorado state court, with Petitioner and three of the Respondents aligning against the fourth Respondent, Henry Klein. Within a few months, the Respondents who had joined the Petitioner in the state court action commenced their own litigation against Petitioner in the United States District Court for the District of Colorado.

The two cases were consolidated by the district court after the earlier one was removed from the Colorado forum under 28 U.S.C. §§ 1441 and 1446. In both instances, jurisdiction in the federal court arose under 28 U.S.C. § 1332(a)(2), diversity of citizenship, because all parties plaintiff (following realignment after removal and consolidation) are citizens of the state of Israel and all defendants are citizens of Colorado.

At trial, the parties pursued numerous claims and counterclaims. Only state law claims sounding in contract and tort were submitted to the jury, which returned verdicts in favor of the claimants in some instances and against them in others. Large punitive damage awards against Petitioner were set aside by the trial judge.[1] The

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[1] The jury awarded each of the three individual Respondents $1.00 on their tort claims and one million dollars in punitive damages. The trial court set the exemplary damage awards aside in their entirety. The court of appeals, reviewing the evidence in the light most favorable to Respondents, ruled this was

trial court ultimately entered judgment, (Appendix B, *infra*), as follows:[2]

Amiram Grynberg, for breach of contract	$166,000
Gur Shomron, for breach of contract	166,000
Henry Klein, for breach of contract	186,000
Defendisk, Ltd., for breach of contract	1
Amiram Grynberg, for breach of fiduciary duty	1
Gur Shomron, for breach of fiduciary duty	1
Henry Klein, for breach of fiduciary duty	1
Defendisk, Ltd., for breach of fiduciary duty	1
Total Judgment Entered (Excluding interest)	$ 518,005

Respondents immediately instituted proceedings to collect both their contract and tort judgments. Respondents pursued forty-two writs of garnishment and judgment liens in aid of their execution efforts. [Aplt.Supp.App. at 989.][3] The two garnishments on which garnishee judgments eventually entered were issued by the district court clerk on June 30, 1992 and July 24, 1992. [Aplee.Supp.App. at 2 and 10.]

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error, and remanded the matter for remittitur by the district court. (Appendix A, *infra*, at A-16 to A-17.)

[2] The trial court issued its Second Amended Judgment, (Appendix B, *infra*), to correct a clerical error in its earlier ruling. Because Petitioners had by then filed their Notices of Appeal, the Second Amended Judgment issued after special leave was obtained from the court of appeals.

[3] Selected citations to the record before the Tenth Circuit are indicated with brackets, should the Court desire to review portions of that record in connection with its consideration of this Petition.

On July 30, 1992, Respondents filed their Notices of Appeal. Meanwhile, they persisted with their efforts to collect and execute on the judgments, moving for judgment against one garnishee on July 21, and against another on August 10, 1992. [Aplee.Supp.App. at 6-9 and 15-19.] The Magistrate Judge assented on August 17, 1992, issuing garnishee judgments and ordering payment into the court's registry of more than sufficient funds to satisfy the entire judgment, with interest. [Aplee.Supp.App. at 24-29.]

When Respondents sought to withdraw the garnished funds from the registry, Petitioner objected, and requested that no payment issue until Respondents acknowledge satisfaction of the judgment, as required by applicable federal and Colorado rules. The district judge agreed, issuing an "Order of Disbursement" which provided that no moneys be paid until "tender to the Clerk of the Court of satisfactions of judgment acknowledged by all four Plaintiffs . . . . " (Appendix D, *infra*, at D-3.) Respondents acceded, albeit "under protest." (Appendix D, *infra*, at D-4 to D-19.)

Petitioner argued in the Tenth Circuit Court of Appeals that Respondents' acts embracing and enforcing the judgment left the case moot and deprived the court of jurisdiction over the appeal. The panel never considered the implication of the execution proceedings. Instead, relying on *United States v. Hougham*, 364 U.S. 310 (1960), the court of appeals rejected Petitioner's jurisdictional argument and held that the judgment creditors were not precluded from pursuing their appeal after obtaining payment of the judgment because payment "does not, standing alone, amount to an accord and satisfaction precluding appeal." (Appendix A, *infra*, at A-9.)

In extending contract theories such as accord and satisfaction to cases where, as here, the judgment creditor acts unilaterally and with force of law to collect a judgment, the Tenth Circuit has essentially established a rule that only by a joint settlement agreement of the parties may the right to appeal be lost. Petitioner respectfully submits that such a holding not only violates a rule established by this Court, but creates an irreconcilable conflict with at least one other circuit on an important matter of federal law. It also denies due consideration to the law of Colorado, where the action was tried.

REASONS FOR GRANTING CERTIORARI

Not since 1866 has the Supreme Court addressed the question whether a party's execution on a judgment he obtained, but now contends is inadequate, affects his right to appellate review. During the intervening years, the courts of appeals have answered the question in conflicting ways, and sometimes, as in this case, in a manner contrary to an older, but nonetheless viable, holding of this Court. Further, the Supreme Court has never considered whether in a diversity case the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires recognition in the federal appellate courts of the substantive law of the forum state concerning mootness of an appeal. The present case invokes these important questions, which require resolution by the Supreme Court.

I. THE LOWER FEDERAL COURTS ARE WITHOUT NEEDED GUIDANCE AS TO WHETHER IN DIVERSITY CASES THE APPLICABLE ACCEPTANCE OF BENEFITS RULE IS AS FORMULATED UNDER STATE OR FEDERAL LAW.

The present case presents a novel question of import to the orderly administration of justice in the federal courts. In diversity cases, such as the one at bar, the federal courts apply the substantive law of the forum to the issues in litigation, under the rule announced in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). The *Erie* doctrine serves to discourage forum shopping by obviating differences in applicable state and federal rules, so as to make any such discrepancy irrelevant to the plaintiff's choice of court. *Hanna v. Plumer,* 380 U.S. 460, 467-68 (1965). The Supreme Court has not determined whether a state prescribed litigation-ending rule can moot an appeal and thereby defeat federal jurisdiction under Article III of the United States Constitution. The circuit courts of appeals have divided on this important issue, and in the present case the answer makes a difference.

Under Colorado law, Respondents' election to enforce their judgment would have resulted in dismissal of this appeal as moot. *Farmers Elevator Company of Sterling v. First National Bank of Fleming,* 181 Colo. 231, 508 P.2d 1261 (1973). The petitioner in *Farmers Elevator* commenced execution on a judgment, then stipulated to its partial satisfaction. The Colorado Supreme Court affirmed dismissal of the appeal, invoking

> the general rule that a party who accepts an award or legal advantage under a judgment normally waives his right to any review of the

> adjudication which may again put in issue his right to the benefit which he has accepted.

Id. at 1263. The court held that under this "acceptance of benefits rule" the petitioner's collection of part of an attorney's fee award "serves to moot his appeal, since the acceptance of the fees is clearly a legal advantage taken pursuant to the judgment in question." *Id.* at 1264. The Colorado rule, first articulated in *Wilson v. Automobile Owners Association Insurance Co.*, 152 Colo. 631, 382 P.2d 815 (1963), retains its vitality. *See, e.g., First National Bank of Meeker v. Theos*, 794 P.2d 1055 (Colo. App. 1990).

Had Respondents chosen to have their claims heard in a Colorado state court, their actions in collecting on the judgment would have resulted in dismissal of their appeal under Colorado law. A plaintiff would certainly consider significant a rule that allows him to execute on a judgment he has appealed, thus not only accelerating his acquisition of the funds, but actually requiring his opponent to finance the continuing litigation. Given a choice of courts, only one of which allows a judgment creditor simultaneously to pursue execution and an appeal, a rational plaintiff would favor the forum that does. This is the very type of consideration that *Hanna* says should inspire the determination to apply state law.

The court of appeals, however, acted under the impression that although it was constrained to follow Colorado law on substantive issues, federal principles resolved this question. (*See* Appendix A, *infra*, at A-9 n.2 and A-12 n.4.) The circuits that have addressed the matter reach different conclusions.

The Seventh Circuit agrees with the Tenth, finding federal law determinative. *United States ex rel. H & S Industries, Inc. v. F.D. Rich Co.*, 525 F.2d 760, 764 (7th Cir. 1975) (rejecting the argument Petitioner now poses). The Eleventh Circuit has gone both ways on the question. *Compare, Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483, 489 (11th Cir. 1990) (relying on Florida's formulation of the acceptance of benefits rule), *with Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151, 1153 (11th Cir. 1994) (applying "federal common law").

The Supreme Court's only discussion of the acceptance of benefits doctrine after *Erie* is in *United States v. Hougham*, 364 U.S. 310 (1960), where jurisdiction arose on a federal question and thus never evoked the *Erie* problem. This Court has, however, held that state laws denying standing can defeat federal jurisdiction under Article III. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Whether state rules extend to other justiciability questions remains undecided, and the present case poses the problem with respect to delineating issues of mootness.

If Colorado law applies, the case is moot and Article III of the Constitution deprives the federal courts of subject matter jurisdiction to consider its merits. A justiciable case or controversy must exist at all stages of the appellate proceedings. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). When a case becomes moot, the courts in the federal system may only take such actions as are needed to finally dispose of the matter. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 390 (1994). Consequently, whether the state or federal formulation of the acceptance of benefits rule applies may have

profound results in diversity cases, including the one at bar.

Without Supreme Court resolution of this problem, plaintiffs will seek federal venues when the practice in state courts would curtail the right to proceed with an appeal after collecting a judgment awarded at trial. Not only does that circumstance further burden the federal judicial system, but it contravenes the fundamental precepts underlying the *Erie* rule. The Tenth Circuit's published opinion in this case, and the decisions of other circuits that apply a similar interpretation of federal law under these conditions, establishes a precedent that forces losing parties to finance their opponents' appeals, and that allows appellants to enjoy the fruits of a judgment that may later be reversed or lost on retrial.

This Petition for Certiorari presents the Supreme Court with occasion to establish a definitive rule in this uncertain but important area.

II. THE TENTH CIRCUIT COURT OF APPEALS' RULING THAT RESPONDENTS' EXECUTION OF THE JUDGMENT DOES NOT BAR THEIR APPEAL CONFLICTS WITH THE ELEVENTH CIRCUIT'S RULE IN SUCH CIRCUMSTANCES.

Because the circuits disagree on the existence or application of a rule that effects an end to litigation, and because the Supreme Court has not resolved the dispute, certiorari should be granted to determine whether a claimant dissatisfied with a judgment received in the trial court may execute on that judgment without mooting the case or waiving his right to appeal. Petitioner argues in

the following section that the Supreme Court has addressed this issue and decided it in a manner contrary to the Tenth Circuit's resolution here. In any event, the decision below conflicts directly with the Eleventh Circuit's disposition of the same question. In other words, were federal law to supply the rule of decision, and if this case had arisen in the Eleventh Circuit, the outcome would have been different. Specifically, the appeal would have been dismissed on the grounds that Respondents, in embracing the judgment they found unsatisfactory (by proceeding with execution on Petitioner's property, and thereby satisfying the judgment), were precluded from further appeal.

In *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645 (11th Cir. 1990), Zaklama obtained a judgment for employment discrimination. He pursued a writ of execution on the judgment, with accrued interest, and the combined sum was paid into the court's registry upon the filing of a satisfaction of judgment. When Zaklama's attorney later interposed a motion for statutory attorney's fees, the district court denied the request as untimely under local rules. In an effort to avoid that result, Zaklama argued that the underlying judgment, on which he had executed and obtained satisfaction, was jurisdictionally deficient. The Eleventh Circuit held that "[s]ince Zaklama has obtained execution on this judgment and the funds have been paid by Mount Sinai, we cannot countenance his contentions of invalidity. . . . " *Id.* at 650.

Wynfield Inns v. Edward LeRoux Group, Inc., 896 F.2d 483 (11th Cir. 1990), is to the same effect. There, Wynfield Inns brought an action in the United States District Court for the Middle District of Florida for breach of contract

and quantum meruit. It prevailed on the quantum meruit claim, but the district court directed a defense verdict on the contract allegation. While appealing that directed verdict, Wynfield took steps to collect the quantum meruit award by registering the Florida judgment with the federal district court in Massachusetts. As a part of its registration papers, Wynfield advised the Massachusetts court of the pending appeal. Nonetheless, registration entered and Wynfield collected its judgment. *Id.* at 487. The Eleventh Circuit held "Wynfield's pursuit and acceptance of LeRoux Group's payment of the quantum meruit damages bars Wynfield's appeal on the contract claim." *Id.* at 489.

The Eleventh Circuit rule, as articulated in *Zaklama* and *Wynfield*, stands in direct contravention to the Tenth Circuit's disposition of the instant case. Here, the Respondents served their writs of garnishment and moved for judgment against the garnishees. They successfully levied on enough of Petitioner's assets to satisfy the entire judgment, with interest, and requested that it be paid to them. The court granted that request, insisting only that Respondents recognize receipt of the funds by performing the legally required and ministerial act of acknowledging satisfaction of the judgment. Fed. R. Civ. P. 64; Colo. R. Civ. P. 58(b).

III. THE TENTH CIRCUIT'S DISPOSITION OF THIS CASE ESTABLISHES PRECEDENT IN CONTRAVENTION OF A SUPREME COURT OPINION ON AN IMPORTANT MATTER OF FEDERAL LAW.

The opinion of the Tenth Circuit places no import on Respondents' pursuit of garnishment, levy and execution

while appealing the very award they sought to enforce. Respondents' voluntary conduct resulted in the taking of enough of Petitioner's funds to satisfy the whole of the judgment. The jurisdictional question posed by the circumstances of this case has been previously addressed by the Supreme Court, but not since *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866).

In *Dashiel*, this Court stated the unequivocal rule that "where the plaintiff has sued out execution, enforced his judgment, and obtained full satisfaction, there is nothing left on which a writ of error can operate." *Id.* at 270. Moreover, timing is important. Here, the trial judge ordered the entry of satisfaction only after Respondents had garnished enough of Petitioner's funds to satisfy the whole of the award, obtained judgment against the garnishees and had the moneys paid into the registry. *Dashiel* makes clear that a judgment creditor loses the right to pursue an appeal

> when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt . . . is gone, although the creditor may not have been paid.

Id. at 269. Thus, under the rule of *Dashiel*, when Petitioner's funds were taken from him by force of law at Respondents' instigation and on account of their judgment, the case became moot, even though the funds in the registry had not yet transferred into Respondents' hands.

This Court's opinion in *Dashiel*, never having been limited, overruled or supplanted by this Court, retains its precedential vitality under the doctrine of stare decisis. The Tenth Circuit's disposition of the instant case thus stands in conflict with decided law.

The opinion below gives no recognition to *Dashiel* or to the rule there embraced. Instead, the Tenth Circuit felt that Respondents "did not voluntarily accept the $4.00 award for breach of fiduciary duty," but "were compelled by the District Court to collect on" that part of the judgment. (Appendix A, *infra*, at A-10.) However, the district judge required Respondents to do nothing more than document the satisfaction already taken. Under *Dashiel*, the judgment was extinguished when Respondents deprived Petitioner of sufficient funds to pay the judgment.[4] The Tenth Circuit's published opinion in this case thus stands in direct opposition to a definitive ruling of this Court. Unfortunately, because of *Dashiel's* age and obscurity, the decision below may acquire undue notoriety and overshadow that case.

On its face the Tenth Circuit's decision appears to hold that a judgment creditor cannot unilaterally render a case moot. In declining Petitioner's suggestion of mootness, the court relies solely on such contractual notions as

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[4] The Respondents garnished on the principal sum of $518,005, [Aplee. Supp. App. at 2], being the combined amount of the judgments on their contract and breach of fiduciary duty claims. (Appendix B, *infra*.) They succeeded in having more money paid into the registry than they were entitled to collect on the aggregated judgment, with the result that some funds sequestered in the registry were ordered refunded to Petitioner. (Appendix D, *infra*, at D-3.)

"accord and satisfaction" and " 'the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties.' " (Appendix A, *infra*, at A-9 to A-10.) However, the authorities invoked in support of that analysis, *United States v. Hougham*, 364 U.S. 310 (1960), and cases decided under the rule of that decision, address the implications of accepting a consensual payment of a judgment without a contemporaneous agreement to finally settle the claim. Where, as here, Respondents proceeded by execution and not by agreement, settlement cases are inapposite.

In *Hougham*, the Supreme Court held that a party who voluntarily pays a judgment to obtain a release of liens does not thereby deny the judgment creditor the right to appeal, in the absence of an agreement to that effect. The circuit opinions relied on by the court of appeals here reflect the essential contract aspects of *Hougham's* holding. Both parties in *United States ex rel. H & S Industries, Inc. v. F.D. Rich Co.*, 525 F.2d 760, 765 (7th Cir. 1975), pursued appeals after striking a bargain to limit costs and interest during pendency of the appeal, thereby demonstrating an agreement not to end the litigation. The Ninth Circuit allowed the appeal to proceed in *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750 (9th Cir. 1969), despite the exchange of conveyance documents appropriate to a specific performance decree, because the defendant indicated an intention to pursue the appeal with plaintiff's knowledge and acquiescence, thus negating any mutual intent to settle the matter conclusively. In *Gadsden v. Fripp*, 330 F.2d 545 (4th Cir. 1964) the court looked for but found no indication that the parties intended acceptance of payment to

work a final settlement. These cases contrast with *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367 (11th Cir. 1987), the final example cited in the Tenth Circuit's opinion. In *Fidelcor*, the court of appeals considered the appeal of a judgment creditor who was displeased with the judgment, but who had accepted a tender of payment and acknowledged satisfaction. The court dismissed the action, characterizing as "well settled" the rule

> that when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives the right to appeal from an otherwise adverse judgment.

Id. at 870.

Thus, while the circuits seem to differ on whether there must be an affirmative reservation of the right to appeal before payment moots the case, or whether the absence of an expectation of final settlement will suffice, each of these cases hinges on whether consensual conduct of the parties evinced an agreement to end the litigation. Here, in contrast, Respondents acted unilaterally and purposefully to avail themselves of the benefit of the judgment by employing the legal machinery of garnishment, levy and execution to pry sufficient money from Petitioner's hand to pay the judgment.

Hougham and *Dashiel* need to be read together for a clear understanding of the federal version of the acceptance of benefits rule. However, as a direct consequence of the published opinion of the Tenth Circuit, litigants and courts may lose sight of the older case and thus

conclude that unilateral action to enforce a judgment does not bar further appellate proceedings. Few victors are fully satisfied by the verdicts they receive. Disgruntled winners who might otherwise accept a judgment and see the litigation end will be encouraged to prolong their disputes in the hope of improving their return. Moreover, judgment creditors with legitimate concerns about the consequences of executing on a judgment are now without meaningful guidance to impart predictability to their decision making.

The decision in this case not only contravenes the pronouncement of *Dashiel,* but also the principle of the recent decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* ___ U.S. ___, 115 S.Ct. 386 (1994). There, the Court held that after settlement moots a case the petitioner has no automatic right to vacatur of adverse lower court decisions. The opinion notes that the actions of an unhappy appellant may precipitate a waiver of the right to pursue further relief. When one purposefully participates in bringing about conditions that moot a case, he "has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari . . . . " *Id.* at 392. In the present context, it makes sense to say, as held in *Hougham,* that a party who pays a judgment for purposes of his own does not thereby deny the judgment creditor the right to seek further review. But a judgment creditor who unilaterally garnishes the property of the loser, levies on it and obtains execution sufficient to satisfy the judgment, should not be allowed to then appeal for more simply because the parties did not agree to end the litigation.

Both *Dashiel* and *Hougham* harmonize with the precept behind *U.S. Bancorp*. The precedent established by the Tenth Circuit in this matter does not. Allowing the decision to stand without review can only further complicate an area of law that needs clarity, inject uncertainty into federal appellate practice and encourage the perpetuation and multiplication of litigation and appeals.

The Tenth Circuit's disposition of this matter represents a departure from its own pre-*Hougham* application of

> a well established general rule of solid foundation that a litigant who accepts all or any substantial part of the benefits of a judgment or decree is precluded from asking that such judgment or decree be reviewed on appeal. He cannot avail himself of its advantages and then challenge its disadvantages on appeal. After accepting all or any substantial part of its benefits he cannot escape its burdens.

Luther v. United States, 225 F.2d 495, 497 (10th Cir. 1954). The Tenth Circuit's rejection of its own pre-*Hougham* authority indicates that court's belief that *Hougham* sets forth the full sweep of the federal version of the acceptance of benefits rule. If the Tenth Circuit is confused about the current state of the law, so too may be other courts in the federal system, either now or in the future. To the extent such confusion is infectious, the decision in this case can only promote the contagion.

By exercising its power to grant certiorari in this case, the Supreme Court can reestablish the importance and rectitude of *Dashiel's* holding. If, on the other hand, *Dashiel* no longer enunciates viable federal law, litigants

and the lower federal courts need assurance in that regard. By granting this Petition and addressing the matter the Court can preserve order in the federal courts and correct the Tenth Circuit's error in this case.

CONCLUSION

For the reasons discussed above, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HENRY KLEIN, (Realigned as Plaintiff); GUR SHOMRON, AMIRAM GRYNBERG, DEFENDISK LIMITED, an Israeli corporation,	)	Nos. 92-1232 92-1233
Plaintiffs/Appellants	)	
v.	)	(Filed Jan. 19, 1995)
JACK J. GRYNBERG, (Realigned as Defendant); DEFENDISK, INC., a Colorado corporation (Realigned as Defendant); GRYNBERG PETROLEUM COMPANY, a Colorado corporation,	)	
Defendants/Appellees	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 84 S 2429 and 84 S 1593)

Patrick D. Vellone, VINTON, WALLER, SLIVKA & PANASCI, Denver, CO.; appearing for Plaintiff-Appellants, Gur Shomron, Amiram Grynberg and Defendisk, Ltd.; and Daniel Crupain, CRUPAIN & GREENFIELD, New York, New York, appearing for Plaintiffs/Appellant, Henry Klein.

Donald W. Alperstein, ALPERSTEIN & COVELL, P.C., Denver CO., appearing for Defendants/Appellees, Jack Grynberg and Grynberg Petroleum Company.

Before KELLY AND McKAY, and ROSZKOWSKI,* Senior District Judge.

ROSZKOWSKI, Senior District Judge

This is an appeal from a judgment notwithstanding the verdict entered by the District Court of Colorado. The suit arose out of a contract between the parties to develop and market a computer software security system invented by the plaintiffs. Following a jury trial in which the plaintiffs essentially prevailed, the District Court struck much of the award and entered judgement as a matter of law for defendants. For the reasons that follow, we affirm that judgment in part and reverse in part.

Background

The story of this litigation begins over ten years ago when plaintiffs-appellants Ami Grynberg, Henry Klein and Gur Shomron invented a means of protecting computer software against unauthorized copying and piracy. In 1983, they obtained patents in the United States and Israel, and formed Defendisk Limited, an Israeli corporation, to develop and market the Defendisk system.

Hoping to market the product in the United States, the plaintiffs sought financing from defendant Jack Grynberg, a sophisticated international businessman and the uncle of Ami Grynberg. In December of 1983, the parties

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*The Honorable Stanley J. Roszkowski, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

entered into a written agreement ("the December agreement") which provided for the formation of Defendisk, Inc., a corporation devoted to researching, developing and marketing the Defendisk system. Under the agreement, plaintiffs would contribute the technology and Jack Grynberg would finance the corporation. Defendant agreed to provide up to $350,000 to cover all costs and development, to obtain a $350,000 bank line of credit, and to make payments at a rate of $39,000 per month. Pursuant to the agreement, 50 percent of the new corporation would be owned by Jack Grynberg and 50 percent by plaintiffs.

On December 10, 1983, Jack Grynberg incorporated Defendisk, Inc., and appointed himself and two employees of Grynberg Petroleum as officers and directors. To start operations, plaintiffs provided confidential and trade secret information and technical support to defendants. Defendisk, Inc., enjoyed early success, entering into contracts for the sale of the Defendisk system to software manufacturers for over $500,000 in revenue, but relations between the parties soon deteriorated and the business quickly fell apart. Among other things, no shareholders agreement was ever drafted, no shares of Defendisk, Inc., were ever issued to plaintiffs, and defendant never obtained a bank line of credit.

The parties disagree on the cause of the breakdown. Plaintiffs allege that Jack Grynberg engaged in a deliberate campaign of abusive treatment, sabotage and deceit in order to divide the plaintiffs and seize the corporation and the benefits of the Defendisk system for himself. Defendants dispute the facts as presented by plaintiffs in

several respects. There is testimony in the record to support both plaintiffs' and defendants' version of the events. However, judging by the verdict, the jury accepted plaintiffs' account. Defendants do not dispute the factual finding of the jury that a breach of contract and a breach of fiduciary duty did occur, and the District Court did not overturn those findings. In addition, when reviewing a judgment notwithstanding the verdict, we must view the evidence in the light most favorable to the party which prevailed at trial. For these reasons, we set forth plaintiffs' version of the facts.

Following the December agreement, plaintiff Henry Klein traveled to this country to provide assistance with the start-up venture. Klein was a man of 34 years whose entire life had been focused on mathematics and computer technology. He was naive and unsophisticated with respect to the business world, and he was nervous about being in an unfamiliar foreign country.

Shortly after his arrival in Denver, Jack Grynberg began a campaign of abusive treatment towards Klein, ostensibly to create a division between him and the other plaintiffs. Defendant told Klein, Shomron and Ami Grynberg conflicting stories, thereby creating confusion, resentment and dissension among the plaintiffs. For instance, defendant told Klein that he was being cheated by his partners and encouraged him to seek a higher percentage of shares than the others, while at the same time, he told Gur Shomron and Ami Grynberg that Klein was creating problems by asking for a higher percentage of shares. Defendant also urged Klein to sue his partners and to place a lien on their interests. Jack Grynberg's outrageous behavior so affected Klein that he was unable

to eat or sleep, and he desired to return to Israel. To prevent him from leaving, defendant threatened him with a phony lawsuit for over $40,000,000.

In the following months, defendant falsely represented that he had issued stock in the United States company, and then persuaded Gur Shomron and Ami Grynberg to provide all the confidential information and technical support necessary to allow defendants to produce the Defendisk system without plaintiffs. Jack Grynberg also feigned interest in, but never followed through on, finalizing a shareholder agreement with plaintiffs, fully funding the venture, and placing plaintiffs on the Board of Directors of the company.

At the same time, Jack Grynberg continued to harass Klein and to drive a wedge between him and his partners, Ami Grynberg and Gur Shomron. Plaintiffs allege that defendant: (1) threatened Klein with criminal prosecution; (2) convinced Shomron and Ami Grynberg to join in a lawsuit against Klein for his alleged impairment of the Defendisk System; (3) threatened to sue Klein's attorneys personally; (4) misrepresented to Klein that he and his nephew Ami Grynberg had a secret agreement to vote their shares together, which would allow them to control the company; (5) misrepresented to Ami Grynberg and Gur Shomron that Klein was demanding a greater percentage of the stock; and (6) accused Klein of stealing the Defendisk system from an Israeli professor.

By the end of June of 1984, Jack Grynberg had secured complete control over all of the proprietary and confidential information concerning the Defendisk system. He drove the company's president out and assumed

all managerial control. He refused to execute a shareholder agreement, to issue shares of stock to plaintiffs, or to allow plaintiffs a say in the operation of the company. He refused to fund development, marketing, or production of the Defendisk system, or to provide a line of credit to enable Defendisk, Inc., to begin full scale production. He would not allow Defendisk, Inc., to operate independently of Grynberg Petroleum Company. He excluded the plaintiffs from any involvement in Defendisk, Inc., and instructed his employees not to allow them on the business premises. Thereafter, Jack Grynberg sought to obtain an independent patent on the Defendisk system.

Plaintiffs allege that by excluding them from Defendisk, Inc., defendant kept the company from adapting to a rapidly changing technological environment. Ultimately, Jack Grynberg's actions prevented plaintiffs from utilizing the window of opportunity to successfully market their invention.

In addition to the foregoing, plaintiff Ami Grynberg alleges that defendant interfered with his prospective business relations in connection with another security device that he invented, the Personal Electronic Access Key ("PEAK"). After the December agreement, Jack Grynberg introduced Ami Grynberg to potential investors who requested the business plan for the PEAK product. Ami Grynberg then scheduled meetings with the investors, but the meetings never took place. Plaintiff alleges that the investors refused to meet with him because of a written request made by Jack Grynberg that they refrain from doing so. In addition, Ami Grynberg alleges that Jack Grynberg claimed to have a "grub stake"

in the PEAK product, which prevented him from securing alternate financing.

Procedural History

In December of 1984, plaintiffs filed suit in the District Court of Colorado alleging breach of contract, breach of fiduciary duty, fraud, misappropriation of trade secrets, and conversion regarding the Defendisk system and Defendisk, Inc. Plaintiff Ami Grynberg also brought a claim for tortious interference with prospective business advantage regarding the PEAK device. Defendants asserted counterclaims similar to those claims brought by plaintiffs, as well as a claim for unjust enrichment relating to the PEAK device.

The case was finally brought to trial in February of 1992. After six weeks of testimony, the jury awarded Ami Grynberg $166,000, Gur Shomron $166,000, Henry Klein $186,000, and Defendisk, Limited, $1.00 on the breach of contract claim. They awarded each plaintiff $1.00 in actual damages on the breach of fiduciary duty claim, and $1,000,000 each to Ami Grynberg, Gur Shomron and Henry Klein in exemplary damages. They awarded Ami Grynberg $200,000 in actual damages and $350,000 in exemplary damages on the tortious interference with prospective business advantage claim. The jury found in favor of defendants on the remainder of plaintiffs' claims. The jury also found in favor of defendants on the counterclaim for unjust enrichment and awarded $10,000 in damages. Judgment reflecting the jury's verdict was entered on March 31, 1992.

On June 24, 1992, the District Court held a hearing on post-trial motions. At that time, the court entered judgment as a matter of law striking the exemplary damage awards for breach of fiduciary duty. The court also entered judgment as a matter of law for defendants on the claim for tortious interference with prospective business advantage. Finally, the court denied plaintiffs' Motion for Assessment of Costs, directing that each party cover its own costs of litigation.

Thereafter, plaintiffs sought to collect on the breach of contract, but in order to do so were required by the District Court to accept the $4.00 in actual damages awarded on the breach of fiduciary duty claim. They accepted the $4.00 under protest and thereafter filed a timely appeal.

Plaintiffs raise several issues on appeal: (1) that the District Court erred in entering judgment notwithstanding the verdict striking the jury award of punitive damages for breach of fiduciary duty; (2) that the District Court erred in barring the plaintiffs from offering certain evidence of lost profits with regards to the claim for breach of fiduciary duty; (3) that the District Court erred by entering judgment notwithstanding the verdict for defendant on the claim for tortious interference with prospective business advantage; and (4) that the District Court erred by failing to award costs to plaintiffs as the prevailing parties.[1]

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[1] Along with their brief, Defendants filed a Motion to Strike from Appellants' Appendix Items not in the Record. The objections to Appellants Proposed Exhibit 133 and Proposed Exhibit 152 which pertain to the PEAK device need not be decided

Waiver of Right to Appeal

Defendants first argue that plaintiffs have waived their right to appeal by accepting payment of the total judgment entered by the District Court for $518,005.[2] They contend that acceptance of the $4.00 awarded for breach of fiduciary duty is a satisfaction of that claim from which an appeal cannot be taken, and that plaintiffs cannot accept the benefits of a judgment while at the same time working to overturn that judgment.

Defendants' argument is in error. Acceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction precluding appeal. *United States v. Hougham*, 364 U.S. 310, 312 (1960). In order to act as a waiver of appeal, a party's acceptance must be voluntary and intended as satisfaction of the judgment. *H & S Industries*, 525 F.2d at 765; *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987). "It is the 'mutual manifestation of an intention to bring the litigation to a definite conclusion

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because of this court's holding on that claim, Appellants' Exhibit 70 (tax return of Jack Grynberg) is properly included in the briefs because a reviewing court may undertake a post-trial determination of the Defendant's economic status for purposes of reviewing a punitive award (*See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991)); and Defendants' opposition to portions of the Vener Deposition is moot because Plaintiffs have no objection to striking those portions of the deposition. Defendants also filed a Motion to Include Certain Items Within Supplemental Appendix. We admit these items based on 10th Circuit Rule 10.3.3.

[2] In a diversity case, the appealability of a judgment is governed by federal law. *United States ex rel. H & S Industries, Inc. v. F.D. Rich Co.*, 525 F.2d 760, 764 (7th Cir. 1975).

upon a basis acceptable to all parties' which bars a subsequent appeal, and not the fact, standing alone, that benefits under the judgment were accepted." *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969) (citing *Gasden v. Fripp*, 330 F.2d 545, 548 (4th Cir. 1964)).

Plaintiffs did not voluntarily accept the $4.00 award for breach of fiduciary duty. In order to collect on the breach of contract claim, they were compelled by the District Court to collect on the breach of fiduciary duty claim, and they did so only under protest. Such an acceptance was not voluntary. Neither was it intended by the plaintiffs to satisfy the judgment and bring the litigation to a conclusion. In this instance, plaintiffs' acceptance did not act as a waiver of their right to appeal.

Punitive Damages

The jury found that defendants breached the fiduciary duty owed plaintiffs and awarded them $1.00 each in actual damages. The District Court entered judgment on the actual damage award and defendants did not cross-appeal contesting its validity.[3] Therefore, we accept that

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[3] Defendants do not contest the entry of judgment for Plaintiffs on the breach of fiduciary duty claim. However, they raise this issue as an alternate reason for upholding the District Court's decision to vacate the punitive awards. Relying on *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984), Defendants contend that the breach of fiduciary duty claim should not have been submitted to the jury because it was subsumed in the contract claim. They argue that since punitive damages are not recoverable in a contract claim, Plaintiffs are not entitled to

defendant was in fact a fiduciary and that he breached his duty. The only issues before us are whether the evidence supported an award of punitive damages for that breach, and if so, whether the amount awarded by the jury was excessive.

We review *de novo* the granting of a motion for judgment notwithstanding the verdict, applying the same standard as the trial court should when deciding the motion. *Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991). Under this standard, the court must view all of the evidence in the light most favorable to the nonmoving party, and then determine whether there is evidence upon which the jury could have properly relied in returning a verdict for the nonmoving party. *Id.* The court may not reweigh the evidence or substitute its judgment for the jury's. *Tennant v. Peoria & Pekin Union Railroad*, 321 U.S. 29, 35 (1944). If there is evidence upon

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punitive damages on the tort claim. However, Colorado law is quite clear that if the breach of contract would also constitute an independent tort, punitive damages are recoverable. *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900, 903-04 (Colo. 1987); *see also, Colorado Interstate Gas Company, Inc. v. Chemco, Inc.*, 833 P.2d 786, 792 (Colo. Ct. App. 1991). We see no difference where, as here, the tort claim is raised separately. Furthermore, the tort sued on in *Isler* was negligence. 749 F.2d at 23. In *Isler*, the court saw the negligence claim as nothing more than an attempt to circumvent the operation of the Commercial Code and rewrite the contract. *Id.* That is not the case here where the Plaintiffs could have sought punitive damages on the contract claim based upon *Podleski*. *Isler* itself recognized the exceptions to its ruling, such as fraud and unconscionability. *Id.* The intentional tort of breach of fiduciary duty alleged in this case is closer to those exceptions.

which the jury could have properly relied in reaching its verdict, that verdict must stand.

In a diversity case, whether punitive damages are warranted is a matter of state law.[4] *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809 (10th Cir. 1990), *vacated*, 499 U.S. 915 (1991). Under Colorado law, to be entitled to punitive damages in a tort claim, a plaintiff must prove beyond a reasonable doubt that the injury complained of was attended by circumstances of fraud, malice or wanton disregard of the rights and feelings of the plaintiff. § 13-21-102, 6 C.R.S. (1973); § 13-25-127(2), 6 C.R.S. (1973); *Tri-Aspen Construction Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986) (en banc).

At trial, plaintiffs presented testimony and other evidence to support their version of events, as described more fully above. The record is replete with evidence of defendants' reprehensible conduct. Most significantly, Henry Klein testified to the abuse he suffered at the hands of Jack Grynberg. In his own testimony, defendant agreed with the general course of events, but denied specific incidents as recounted by plaintiffs and their witnesses.

Thus, the jury was presented with conflicting testimony regarding certain events and the motivations behind defendant's actions. In such a case, it is the jury's prerogative to weigh the credibility of the witnesses and

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[4] Jurisdiction in this case is based upon diversity. Therefore, this court must follow Colorado law in determining the substantive issues of law presented in this appeal. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

determine [sic] should be believed. The Supreme Court in *Tennant v. Peoria & Pekin Union Railroad* described the jury's function this way: "It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion . . . cannot be ignored." 321 U.S. at 35 (citations omitted).

The District Court entered judgment as a matter of law striking the exemplary damage award because it believed that the defendant's conduct was not as egregious as some defendants' conduct in cases where large punitive damage awards were allowed. The court thought that defendant's acts were "not completely egregious in nature," but it is not the court's prerogative to substitute its opinion of what constitutes egregious behavior for that of the jury.

Because there was testimony and other evidence to support the plaintiffs' contentions and the jury was properly instructed on the reasonable doubt standard for exemplary damages,[5] we find no reason to believe that

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[5] The jury was given Jury Instruction No. 83 which reads as follows:

> If you find in favor of the Plaintiffs, Gur Shomron, Amiram Grynberg, and Henry Klein, and award them actual damages for their claims of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against the Defendants. If you find beyond a reasonable doubt that the injury complained of was attended by circumstances of fraud, malice, or wanton and reckless

the jury was incorrect in its determination that punitive damages were warranted. The presence of conflicting testimony need not prevent a jury from deciding that one side has proven the existence of facts beyond a reasonable doubt. There was ample evidence, if believed to be true, that was properly relied upon by the jury and could support a punitive award beyond a reasonable doubt.

In some instances, however, there may be evidence in the record to support a punitive award, but the figure arrived at by the jury is unreasonable. When a court concludes that there was error only in the excessive damage award, but no error tainting the finding of liability, it may order a remittitur or grant a new trial if the plaintiff refuses to accept the remittitur. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

There is no bright line between an acceptable and an unacceptable award of punitive damages. *TXO Production Corp. v. Alliance Resources Group*, ___ U.S. ___, ___, 113 S.Ct. 2711, 2720, (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). Instead, the standard is one of reasonableness. This court in *Malandris* delineated that standard as "whether the punitive damage award was so excessive that is [sic] shocks the judicial conscience or

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disregard of the rights and feelings of the Plaintiffs, then in addition to actual damages, you may also assess a reasonable sum as exemplary damages.

Exemplary damages, if assessed, are to be assessed as punishment of the Defendants, and as an example to others.

We note that the instruction used appears to be substantially the same as that given in *Post Office*. *See* 913 F.2d at 808.

leads to the inescapable inference that it resulted from improper passion or prejudice on the part of the jury." *Malandris*, 703 F.2d at 1177. *See also TXO*, 113 S.Ct. at 2714, 2725.

The defendants contend that a 1,000,000 to 1 ratio of exemplary to actual damages is impermissible. Certainly, high ratios deserve "close judicial scrutiny." *Post Office*, 913 F.2d at 811. However, this court has never held that any ratio is per se excessive. Rather, the ratio "is merely one factor to consider in reviewing the excessiveness of an award." *Id.* at 810.

Although there is a great disparity between the actual damages and the exemplary award in this case, nominal actual damages can sustain an exemplary damage award. *See, e.g., Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987) (50,000:1 ratio of punitive to actual damages upheld). Moreover, the Supreme Court recently held that the dramatic disparity between actual damages and a punitive award is not controlling. *TXO*, 113 S.Ct. at 2713. Instead, a court must also consider other factors, such as (1) the magnitude of the potential harm to the intended victims, (2) the possible harm to other victims if similar future behavior is not deterred, (3) the financial gains that the defendant hoped to achieve through his scheme, (4) whether the scheme was a part of a larger pattern of fraud and trickery, (5) the bad faith of the defendant, and (6) the petitioner's wealth. *Id.* at 2721-22.

Colorado courts have outlined four factors to consider when determining whether a punitive award is reasonable: (1) the nature of the act which caused the injury; (2) the economic status of the defendant; (3) the

deterrent effect of the award on others; and (4) the relation to the compensatory award. *Malandris,* 703 F.2d at 1177.

The jury in this case believed that the defendant acted maliciously. The amount of money potentially at stake in this venture was substantial. Through his scheme, defendant hoped to reap sizable financial gains by fraudulently securing the Defendisk system for himself. Defendant argues that he did not realize financial benefit from any wrongs to the plaintiffs. This ignores the fact that he apparently intended to, but his own actions prevented the company from becoming profitable. Furthermore, the jury could have concluded that defendant must be deterred from committing similar acts to future business associates. Finally, the defendant is apparently a wealthy man, and the jury could have determined that a sizable award was necessary to punish and deter him.

The jury was properly instructed regarding the burden of proof, and there was sufficient evidence in the record to support its finding that exemplary damages were warranted. The trial court, however, was "shocked" by the sheer size of the verdict. The defendant's conduct was indeed deplorable, but the jury assessed the actual damages at only $4.00. Certainly, considering the nature of the conduct involved, a sizable exemplary award was warranted, but the $3,000,000 figure seems excessive. Under these circumstances, we think it proper that a remittitur be granted by the trial court, who is in the best position to make a just determination. Moreover, there is inadequate evidence in the record to determine defendant's ability to pay, and the District Court can hold a hearing to ascertain defendant's current economic status.

If the plaintiffs do not accept the reduction, a new trial should be granted on this issue.

Lost Profit Evidence

Plaintiffs contend that the District Court erred by precluding them from offering certain expert testimony from Lester Thompson regarding lost profits on their claim for breach of fiduciary duty. Rulings limiting testimony are reviewed for abuse of discretion and are reversible only after a showing of prejudice to substantial rights or manifest injustice.[6] Fed. R. Evid. 103(a)(1); *Polys*, 941 F.2d at 1407; *Marsee v. United States Tobacco Co.*, 866 F.2d 319, 323 (10th Cir. 1989). Here, the jury awarded breach of contract damages and breach of fiduciary damages in an amount smaller than admitted evidence would have supported, which suggests that plaintiffs were not prejudiced by the exclusion of this evidence. Plaintiffs have failed to show prejudice, and, therefore, we affirm the District Court's ruling.

Tortious Interference with Prospective Business Advantage

In 1983, plaintiff Ami Grynberg developed, in addition to the Defendisk System, a security device for computer hardware known as the Personal Electronic Access

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[6] Defendants contend that Plaintiffs failed to make an offer of proof at trial regarding Mr. Thompson's testimony, and therefore this court can only reverse if "there was plain error affecting a party's substantial rights." *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1408 (10th Cir. 1991). Under either standard, we find no prejudice to Plaintiffs.

Key ("PEAK"). He alleges that Jack Grynberg undertook an intentional course of conduct to interfere with the formation of a contract between him and third parties for the financing of the PEAK system. The jury awarded Ami Grynberg $200,000 in actual damages and $350,000 in punitive damages for tortious interference with prospective business advantage, but the District Court entered judgment as a matter of law for defendants, finding the claim "so speculative it's scary."

Again, we review *de novo* a judgment notwithstanding the verdict, applying the same standard that the District Court should apply: Is there evidence in the record upon which the jury could have properly relied in returning a verdict for the nonmoving party? *Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991). A verdict is proper only if supported by more than a scintilla of evidence. *Id.* When, as here, jurisdiction is based upon diversity, we also review *de novo* the District Court's interpretation of the substantive state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

To establish a claim for tortious interference with prospective business relations, a plaintiff must show intentional and improper interference preventing the formation of a contract. *Behunin v. Dow Chemical Company*, 650 F. Supp. 1387, 1392-93 (D. Colo. 1986); *Dolton v. Capital Federal Savings and Loan Association*, 642 P.2d 21, 23 (Colo. Ct. App. 1981). The defendant can interfere either by inducing or causing a third party not to enter into or continue relations, or by preventing the plaintiff from acquiring or continuing the relations. *Behunin*, 650 F. Supp at 1393. It is not necessary to prove an underlying contract. *Wasalco, Inc. v. El Paso County*, 689 P.2d 730, 732

(Colo. Ct. App. 1984). However, a protected relationship exists only if there is a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a mere hope. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 898 (3rd Cir. 1981); *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Penn. 1979); *cf. Plaza Esteban v. La Casa Nino, Inc.*, 738 P.2d 410, 412 (Colo. Ct. App. 1987) (requiring a "firm offer"), *rev'd on other grounds*, 762 P.2d 669 (Colo. 1988).

The court below held that in this case the prospective benefits were too speculative to support an award for tortious interference with prospective business advantage; that plaintiff had a "mere hope" of a prospective relationship. We agree. Plaintiff had no ongoing relationship with any of the investors. *Cf. Behunin*, 650 F. Supp. at 1393; *Plaza Esteban*, 738 P.2d at 412. Indeed, he had only one meeting with each. Plaintiff offered no evidence that any of the prospective investors had the intent to finance his invention; there is no evidence of what the investors thought of the project. The evidence does not support a finding that Ami Grynberg enjoyed a reasonable probability of receiving any economic benefits from these investors.

Plaintiff failed to make a prima facie case for tortious interference with prospective business advantage because there was no evidence establishing a reasonable probability that he would have received economic benefits from these investors. Thus, we affirm the District Court's judgment notwithstanding the verdict on plaintiffs' claim for tortious interference with prospective business advantage.

Costs

Federal Rule of Civil Procedure 54(d) authorizes an award of costs to prevailing parties. The Rule states that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). This court has held that Rule 54(d) creates a presumption that the prevailing party shall recover costs. *True Temper Corp. v. CF&I Steel Corp.*, 601 F.2d 495, 509-10 (10th Cir. 1979). A district court's denial of costs is reviewed for an abuse of discretion. *Id.*

The court below denied plaintiffs' Motion for Assessment of Costs, finding that the litigation was complex, "close" and protracted, and that the delay was neither party's fault. The court also noted that the plaintiffs did not prevail on all of their claims. For these reasons, the court directed that each party bear its own costs.

Plaintiffs were awarded over $500,000 on their breach of contract claim. In addition, pursuant to our holding, they are entitled to punitive damages on their breach of fiduciary duty claim. Plaintiff prevailed on the major issues in this case. To deny them costs would be in the nature of a severe penalty imposed upon them, and there must be some apparent reason to penalize the prevailing party if costs are to be denied. *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir. 1980); *True Temper Corp.*, 601 F.2d at 509. We find no justification to penalize plaintiffs because this litigation was complex or lengthy. Defendants' own actions brought about the litigation. Accordingly, we hold that the District Court's denial of costs to the plaintiffs was an abuse of discretion.

Conclusion

For the reasons stated, the District Court's judgment is affirmed in part and reversed in part. The cause is remanded to the District Court with directions that it reinstate that part of the jury verdict awarding exemplary damages for breach of fiduciary duty and then grant an appropriate remittitur; the District Court should also make an appropriate assessment of costs against defendants. In so ordering, we emphasize this court's view that the plaintiffs are entitled to significant punitive damages. If plaintiffs accept the reduction of the exemplary award, then judgment as so modified shall be final; otherwise, an order shall be entered granting a new trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-S-1593
84-S-2429

JACK GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

CIVIL ACTION NO. 84-S-2429

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY,

Defendants.

SECOND AMENDED JUDGMENT

(Filed Aug. 26, 1992)

Pursuant to and in accordance with the Honorable Daniel B. Sparr's August 26, 1992 Order regarding the Defendants' Motion for Correction of Clerical Mistakes in

Amended Judgment, which is incorporated herein by reference, the Amended Judgment entered on June 29, 1992 is hereby amended as follows:

IT IS ORDERED that judgment is hereby entered against Defendants, Jack J. Grynberg and Grynberg Petroleum Company, as to the breach of contract claim in favor of:

Plaintiff Gur Shomron in the amount of $166,000.00;
Plaintiff Amiram Grynberg in the amount of $166,000.00;
Plaintiff Henry Klein in the amount of $186,000.00;
Plaintiff Defendisk, Ltd. in the amount of $1.00;

Pre-Judgment interest to accrue at the legal rate of 8% from June 27, 1984.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Defendants, Jack J. Grynberg and Grynberg Petroleum Company, and against Plaintiffs Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. on the claim for concealment or nondisclosure. The Plaintiffs' claim for concealment or nondisclosure is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. and against Defendants, Jack J. Grynberg and Grynberg Petroleum Company on the claim for breach of fiduciary duty. Compensatory damages in the amount of $4.00 are awarded.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Defendants, Jack J. Grynberg and

Grynberg Petroleum Company and against Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. on the claim for conversion. The Plaintiffs' claim for conversion is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Defendants, Jack J. Grynberg and Grynberg Petroleum Company and against the Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. as to the claim for violation of proprietary rights. The Plaintiffs' claim for violation of proprietary rights is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Defendant, Jack J. Grynberg and against the Plaintiff, Amiram Grynberg on the claim for intentional interference with prospective contractual relation. Plaintiff Amiram Grynberg's claim for intentional interference with prospective contractual relation is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. and against Defendants, Jack J. Grynberg and Grynberg Petroleum Company on the counterclaim for breach of contract. The Defendants' counterclaim for breach of contract is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. and against Defendants, Jack J. Grynberg and Grynberg Petroleum Company on the counterclaim for misrepresentation. The

Defendants' counterclaim for misrepresentation is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs, Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Ltd. and against Defendants, Jack J. Grynberg and Grynberg Petroleum Company on the counterclaim for breach of fiduciary duty. The Defendants' counterclaim for breach of fiduciary duty is hereby dismissed.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of Defendant Jack J. Grynberg against the Plaintiff Amiram Grynberg on the counterclaim for unjust enrichment in the amount of $10,000.00. Pre-judgment interest to accrue at the legal rate of 8% from June 27, 1984.

IT IS FURTHER ORDERED that post judgment interest shall accrue at the legal rate of 4.58% from March 31, 1992.

IT IS FURTHER ORDERED that the parties shall bear their own costs.

Dated at Denver, Colorado this 26th day of August, 1992.

FOR THE COURT:

/s/ James R. Manspeaker,
JAMES R. MANSPEAKER,
CLERK

APPROVED AS TO FORM:

/s/ Daniel B. Sparr
Daniel B. Sparr
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HENRY KLEIN, (Realigned as Plaintiff); GUR SHOMRON, AMIRAM GRYNBERG, DEFENDISK LIMITED, an Israeli corporation;	)	Nos. 92-1232 92-1233
Plaintiffs - Appellants,	)	
v.	)	
JACK J. GRYNBERG, (Realigned as Defendant); DEFENDISK, INC., a Colorado corporation (Realigned as Defendant); GRYNBERG PETROLEUM COMPANY, a Colorado corporation,	)	
Defendants - Appellees.	)	

ORDER
Entered February 16, 1995

Before KELLY and McKAY, Circuit Judges, and ROSZKOWSKI*, Senior District Judge.

---

*Honorable Stanley J. Roszkowski, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

This matter comes on for consideration of appellees Jack Grynberg and Grynberg Petroleum Company's petition for rehearing and appellant Amiram Grynberg's petition for rehearing.

Upon consideration whereof, the petitions for rehearing are denied.

Entered for the Court

PATRICK FISHER
Clerk

By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

CIVIL ACTION NO. 84-S-1593
84-S-2429

JACK GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

CIVIL ACTION NO. 84-S-2429

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY,

Defendants.

ORDER OF DISBURSEMENT

(Filed Sept. 2, 1992)

THIS MATTER comes before the court for disbursal of the funds held in the Registry of the Court. The court

has reviewed the parties' motions, objections, oral argument in open court, and the applicable law and is fully advised in the premises.

Accordingly, IT IS ORDERED that the funds held in the Registry of the Court shall be disbursed as follows:

1. The amount of $307,453.97 shall be disbursed payable to the law firm of Vinton, Waller, Slivka & Panasci and Plaintiff Amiram Grynberg in satisfaction of judgment for Amiram Grynberg's First Claim for Relief for breach of contract.

2. The amount of $307,453.97 shall be disbursed payable to the law firm of Vinton, Waller, Slivka & Panasci and Plaintiff Gur Shomron in satisfaction of judgment for Gur Shomron's First Claim for Relief for breach of contract.

3. The amount of $344,059.37 shall be disbursed payable to attorney Daniel Crupain and Plaintiff Henry Klein in satisfaction of judgment for Henry Klein's First Claim for Relief for breach of contract.

4. The amount of $1.67 shall be disbursed payable to the law firm of Vinton, Waller, Slivka & Panasci and Plaintiff Defendisk, Ltd in satisfaction of judgment for Defendisk, Ltd.'s First Claim for Relief for breach of contract.

5. The amount of $1.67 shall be disbursed payable to the law firm of Vinton, Waller, Slivka & Panasci and Plaintiff Amiram Grynberg in satisfaction of judgment for compensatory damages on Amiram Grynberg's Third Claim for Relief for breach of fiduciary duty.

6. The amount of $1.67 shall be disbursed payable to the law firm of Vinton, Waller Slivka & Panasci and Plaintiff Gur Shomron in satisfaction of judgment for compensatory damages on Gur Shomron's Third Claim for Relief for breach of fiduciary duty.

7. The amount of $1.67 shall be disbursed payable to attorney Daniel Crupain and Plaintiff Henry Klein in satisfaction of judgment for compensatory damages on Henry Klein's Third Claim for Relief for breach of fiduciary duty.

8. The amount of $1.67 shall be disbursed payable to the law firm of Vinton, Waller, Slivka & Panasci and Plaintiff Defendisk, Ltd. in satisfaction of judgment for compensatory damages on Defendisk, Ltd.'s Third Claim for Relief for breach of fiduciary duty.

9. The remainder of $17.42 shall be disbursed payable to the law firm of Alperstein & Covell, P.C. and Defendants Jack J. Grynberg and Defendisk, Inc. as reimbursement for inappropriate costs charged to the Defendants.

10. The disbursement shall only be made by the Clerk of the Court upon the tender to the Clerk of the Court of satisfactions of judgment acknowledged by all four Plaintiffs on the aforementioned Claims for Relief.

Dated at Denver, Colorado this 2nd day of September, 1992.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION
OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $307,453.97, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the First Claim for Relief of Amiram Grynberg for breach of contract. I hereby

authorize and direct the clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
Denver CO 80202
(303) 534-4499

Attorney-in-fact for
Amiram Grynberg

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Amiram Grynberg.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $307,453.97, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the First Claim for Relief of Gur Shomron for breach of contract. I hereby authorize

and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
Denver CO 80202
(303) 534-4499

Attorney-in-fact for Gur Shomron

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Gur Shomron.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $344,059.37, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged of that part of the judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the claim of Henry Klein for breach of contract. I hereby authorize

and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my signature this 4th day of September, 1992.

/s/ Paul Greenfield
PAUL GREENFIELD
Crupain & Greenfield
225 Broadway
New York, NY 10007

Attorney-in-fact for Henry Klein

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Paul Greenfield, Attorney-in-fact for Henry Klein.

Witness my hand and official seal.

[SEAL]

/s/ Teresa Jo Armstrong
Notary Public

My Commission Expires: 12-12-92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $ 1.67, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the First Claim for Relief

of Defendisk, Ltd. for breach of contract. I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
Denver CO 80202
(303) 534-4499

Attorney-in-fact for
Defendisk, Ltd.

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Defendisk, Ltd.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGEMENT OF SATISFACTION OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $ 1.67, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged, under protest, of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the Third

Claim for Relief of Amiram Grynberg for breach of fiduciary duty. I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action, as ordered by the Court on September 2, 1992, over Plaintiff's objection.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
Denver CO 80202
(303) 534-4499

Attorney-in-fact for
Amiram Grynberg

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Amiram Grynberg.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $ 1.67, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged, under protest, of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the Third Claim for Relief of Gur Shomron for breach of fiduciary

duty. I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action, as ordered by the Court on September 2, 1992, over Plaintiff's objection.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
Denver CO 80202
(303) 534-4499

Attorney-in-fact for Gur Shomron

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Gur Shomron.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION
OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $ 1.67, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged, under protest, and as ordered by the Court over Plaintiff's objection on September 2, 1992, of that part of the judgment entered in said District Court that relates to the claim of Henry Klein for breach of fiduciary duty, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment

dated June 30, 1992, and Second Amended Judgment dated August 26, 1992. I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action.

Witness my signature this 4th day of September, 1992.

/s/ Paul Greenfield
PAUL GREENFIELD
Crupain & Greenfield
225 Broadway
New York, NY 10007

Attorney-in-fact for Henry Klein

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Paul Greenfield, Attorney-in-fact for Henry Klein.

Witness my hand and official seal.

[SEAL]

/s/ Teresa Jo Armstrong
Notary Public

My Commission Expires: 12-12-92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-S-1593 (Consolidated With No. 84-S-2429)

JACK J. GRYNBERG and DEFENDISK, INC.,

Plaintiffs (Realigned as Defendants),

v.

HENRY KLEIN,

Defendant (Realigned as Plaintiff).

GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LTD.,

Plaintiffs,

v.

JACK J. GRYNBERG and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ACKNOWLEDGMENT OF SATISFACTION
OF JUDGMENT

(Filed Sept. 4, 1992)

FOR AND IN CONSIDERATION of the sum of $ 1.67, paid by Jack J. Grynberg, full satisfaction is hereby acknowledged, under protest, of that judgment entered in said District Court, in the above entitled action on the 31st day of March, 1992, as modified by Amended Judgment dated June 30, 1992, and Second Amended Judgment dated August 26, 1992, that relates to the Third Claim for Relief of Defendisk, Ltd. for breach of fiduciary

duty. I hereby authorize and direct the Clerk of said Court to enter of record satisfaction of said judgment in said action, as ordered by the Court on September 2, 1991, over Plaintiff's objection.

Witness my signature this 4th day of September, 1992.

/s/ Patrick D. Vellone
PATRICK D. VELLONE
1600 Stout Street, Suite 1100
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(303) 534-4499

Attorney-in-fact for
Defendisk, Ltd.

COUNTY OF Denver)
) ss.
STATE OF COLORADO)

Subscribed and sworn to before me this 4th day of September, 1992, by Patrick D. Vellone, Attorney-in-fact for Defendisk, Ltd.

Witness my hand and official seal.

[SEAL]

/s/ Betsy Smith
Notary Public

My Commission Expires: 7-20-93

(2)

No. 94-1898

Supreme Court, U.S.
FILED
JUN 19 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FREEBORN & PETERS
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QUESTIONS PRESENTED

Respondents do not believe that the questions as framed by Petitioner accurately reflect the question answered by the Tenth Circuit Court of Appeals in this case. The issue is whether the involuntary acceptance of an insufficient judgment moots the right to appeal.

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No. 94-1898

In The

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gur Shomron, Amiram Grynberg and Defendisk, Limited, respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In this diversity case, a jury awarded Respondents in excess of $500,000.00 for breach of contract; $4.00 for breach of fiduciary duty; and $3,000,000.00 for punitive damages. The district court struck the punitive damages

award, which Respondents appealed to the Tenth Circuit Court of Appeals. While this appeal was pending, Respondents attempted to collect on the breach of contract judgment. At the request of Petitioner, the district court refused to allow Respondents to collect on this claim unless they also collected on the $4.00 breach of fiduciary duty judgment. Respondents did so only under protest. After insisting that Respondents accept this judgment, Petitioner then argued that by doing so, Respondents waived their right to appeal.

The Tenth Circuit correctly held that federal law applies to the appealability of a judgment in a diversity case. It then determined, based on the unique facts of this case, that the coerced satisfaction of a $4.00 judgment did not moot the appeal.

Petitioner's recitation of the procedure and factual background leading to the judgment in favor of Respondents is irrelevant to any of the issues he presents for review by this Court. Additionally, the Petitioner's discussion of the post-judgment enforcement proceedings, and the Tenth Circuit's rationale for rejecting the same arguments he now makes here, is based on misstatements of fact and law which have a bearing on the question of what issue, if any, should properly be before the Court if certiorari is granted.

REASONS FOR DENYING CERTIORARI

The appellate decision below was based upon facts unique to this case alone. As the Tenth Circuit Court of Appeals properly found:

> Plaintiffs did not voluntarily accept the $4.00 award for breach of fiduciary duty. In order to collect on the breach of contract claim, *they were compelled by the District Court* to collect on the breach of fiduciary duty claim, *and they did so only under protest*. Such an acceptance was not voluntary. Neither was it intended by the Plaintiffs to satisfy the judgment and bring the litigation to a conclusion. In this instance, Plaintiffs' acceptance did not act as a waiver of their right to appeal.

Petitioner's Appendix A at A-10 (emphasis added). The court then held, as a matter of federal law, that the coerced acceptance of an insufficient judgment by one party will not moot the appeal of another.

Petitioner argues that state law, the Colorado "Acceptance of the Benefits Rule," should have controlled the appealability of the judgment. However, because the court found that Respondents did not voluntarily accept the judgment, the question of whether federal or state law applies will make no difference to the outcome of this case. Even under Colorado's "Acceptance of the Benefits Rule," there must still be a "voluntary" acceptance of the benefits before an appeal will be mooted. *See Stenback v. Front Range Financial Corp.*, 764 P.2d 380, 383 (Colo. App. 1988). (Compliance with a court order, standing alone, will not be deemed a voluntary satisfaction of a judgment sufficient to preclude an appeal.)

These unique facts also prevent this case from having any broad applicability, even were the other necessary criteria for review by certiorari present. This case neither involves substantial questions of federal law on which lower courts are in need of guidance, nor presents any

controversy among the various Circuit Courts of Appeal. Instead, the highly fact-based issues involved in this decade old dispute have been appropriately resolved by the Tenth Circuit Court of Appeals in complete accord with the decisions of both this Court and other Circuit Courts of Appeal.

I. THE TENTH CIRCUIT RULING IS BASED ON FACTS UNIQUE TO THIS CASE ALONE.

A decision in this case must be bounded by the unique facts involved in the forced satisfaction, under protest, of the district court judgment. Respondents specifically objected to Petitioner's request that Respondents accept the $4.00 judgment, an acceptance under protest, which Petitioner now claims to have waived Respondents' rights to seek review of a judgment striking over $3,000,000.00 awarded to them by the jury. At the request of Petitioner, a show cause hearing was held before the trial court in which counsel for Petitioner argued that the $4.00 amount was necessarily included in an amount garnished from numerous parties, post-judgment. Counsel for Respondents argued that they did not seek the $4.00 for compensatory damages on the breach of fiduciary duty claims ("We don't want the $4.00 . . . ") and the trial court expressly recognized that this amount was the subject of a then pending appeal:

> Well, I'm not inclined to – if they don't want the money for the $4.00 claim and the claim is on appeal and they don't want a satisfaction for the $4.00 claim . . . I am not inclined to force them to satisfy a claim that is on appeal that they don't want to satisfy.

Show Cause Hearing, Tr. p. 26. Nevertheless, the trial court later refused to enter an order disbursing *any* of the funds in the registry of the court ($958,000.00) which the parties agreed was an amount necessary to satisfy the breach of contract claim (but not the breach of fiduciary duty claim), until the $4.00 issue was decided. Thus, to receive any of the money due them under the judgment on their first claim for relief, Respondents were forced to take the $4.00 on the second claim, and file a satisfaction of judgment on that claim. They did so only "under protest," to avoid further loss of the use of over $950,000, together with an additional $118.00 per day in interest. See Petitioner's Appendix D at D-12 through D-19. Under these circumstances, it is clear that the "satisfaction" of the breach of fiduciary duty judgment of $4.00 was anything but voluntary. Since there was no voluntary acceptance of the judgment, there was no waiver of the right to appeal, as the Tenth Circuit correctly held.

A party may accept what is securely his and appeal seeking more. *Kuba v. Risto Trucking Co., Inc.*, 811 F.2d 1053, 1055 (7th Cir. 1987). As the Tenth Circuit properly recognized, "[a]cceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction precluding an appeal." Petitioner's Appendix A at A-9; citing *United States v. Hougham*, 364 U.S. 310, 312 (1960). Instead, in order to act as waiver of an appeal, "a party's acceptance must be voluntary and intended as satisfaction of the judgment." *Id.*; citing *H & S Industries*, 525 F.2d at 765; *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987).

Rather than unilateral action by one party to coerce acceptance of an insufficient judgment, what is needed to moot an appeal is the "mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties." *Id.* at A-9, A-10; quoting *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969) citing *Gadsden v. Fripp*, 330 F.2d 545, 548 (4th Cir. 1964); *See* also *Commercial Union Insurance Co. v. Walbrook Insurance Co., Ltd.*, 41 F.3d 764, 768-769 (1st Cir. 1994). That mutual intention did not exist in this case.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE TENTH CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S PRIOR OPINIONS.[1]

In support of his argument that there exists an irreconcilable conflict between the circuits with respect to "the existence or application of a rule that effects an end to litigation [as a result of the acceptance of a benefit of a judgment]," Petitioner points to the decisions of the Tenth and Seventh Circuits, on the one hand, and the Eleventh

---

[1] Petitioner's argument that there is apparent confusion as to the application of federal or state law on the issue of the appealability of that judgment, is also without merit. Petition at 9. Petitioner admits that the Seventh and Tenth Circuits find federal law determinative, and the most recent and only Eleventh Circuit case to squarely address the issue found federal common law applicable with respect to the appealability of a satisfied judgment. *See Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151, 1153 (11th Cir. 1994).

Circuit, on the other hand. Petition at 10 and 11. However, Petitioner's reliance on *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645 (11th Cir. 1990) and *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990) is misplaced. The purported conflict between the cases and the Tenth Circuit's Opinion is entirely attributable to certain dispositive factual distinctions between the cases.

In *Zaklama*, the prevailing party attempted to avoid the denial of an untimely motion for statutory attorney fees by appealing the underlying judgment on which he had executed and obtained satisfaction. *Zaklama v. Mount Sinai Medical Center*, 906 F.2d at 647. The Eleventh Circuit properly held that, because Zaklama had voluntarily pursued a writ of execution on the judgment and had voluntarily filed a satisfaction of judgment, Zaklama was unable to appeal the decision. *Id.* at 650.

Likewise, in *Wynfield Inns*, Wynfield Inns attempted to appeal a directed verdict for the defense on a breach of contract action while at the same time, taking steps to collect on a judgment on its alternative quantum meruit claim. *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d at 487. The court held that because Wynfield Inns had voluntarily accepted the Defendants' payment of the quantum meruit damages, the appeal was barred on the contract claim since the "quantum meruit and contract remedies are inconsistent, mutually exclusive and alternative measures of recovery." *Id.* at 489. Thus by pursuing the quantum meruit damages, Wynfield Inns had made an election of its remedy, under the quantum meruit claim, thereby precluding it from later attempts to pursue an inconsistent remedy under the contract claim. *Id.*

When read in context, neither *Zaklama*, nor *Wynfield Inns* is inconsistent with the Tenth Circuit's holding in this case, where "voluntary" action on the part of Respondents was expressly found to be lacking. *See*, also *Fidelcor Mortgage v. Insurance Company of North America*, 820 F.2d at 370 (waiver of the right to appeal only occurs where there has been a voluntary and intentional acceptance of the substantial benefits of a judgment).

Finally, for the same reason, the Tenth Circuit's opinion is entirely consistent with the prior Supreme Court opinions regarding the effect of the acceptance of the benefits of a judgment on that judgment's appealability. In *United States v. Hougham*, 364 U.S. at 312, this Court held that "acceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." The Tenth Circuit's opinion is not to the contrary: A party's acceptance must be voluntary and intended as satisfaction of the judgment. *See* Petitioner's Appendix A at A-9. Also consistent is *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), where this Court properly recognized that it is only "when the property is lost to the debtor *in consequence of the legal measures which the creditor has pursued*, the debt . . . is gone. . . . " *Id.* at 269 (emphasis added). Unlike the circumstances contemplated in *Dashiel*, Respondents did not voluntarily pursue any legal measures to recover either the $4.00 breach of fiduciary duty claim or the punitive damages claim, and therefore did not lose their right to appeal the erroneous striking of their punitive damages claim.

CONCLUSION

The Tenth Circuit Court of Appeals properly applied this Court's precedent to deny Petitioner's attempt to unilaterally moot Respondents' appeal. The record below is clear: No one was under the impression that this ten year long litigation had been resolved by mutual agreement or voluntary satisfaction of a $4.00 judgment. Respondents request that the Petition for Writ of Certiorari be denied.

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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Tenth Circuit

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a conflict among the Circuits concerning a party's right in a diversity case to appeal an unfavorable judgment where it has accepted the benefits of a separable award?

2. Whether federal law governs the appealability of a judgment entered in a federal court in a diversity suit?

3. Whether Article III, Section 2 of the Constitution of the United States deprives the Courts of Appeals of jurisdiction where an appellant accepts, under protest, an unsatisfactory award pursuant to the directive of the District Court?

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In The
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HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Henry Klein, adopts and relies on the statement of the case set forth by the 10th Circuit in *Klein v. Grynberg*, 44 F. 3d 1497 (10th Cir. 1995).

SUMMARY OF THE ARGUMENT

A party to a lawsuit who prevails on certain claims but not on others is free to accept the benefits of the award in its favor without compromising its ability or right to appeal the unfavorable award, provided that the claims are separable. The Circuit Courts are in agreement on this settled principle of law.

The appealability of judgments rendered by the District Courts is an issue governed by federal law. This Court has clearly established this precept, and the courts below have uniformly accepted it.

Article III, Section 2 of the Constitution of the United States permits a party to appeal a judgment provided the appellant retains a stake in the appeal; appellate jurisdiction is a creation of Congress, which governs the

appealability of judgments rendered by the District Courts. Thus, as long as the fundamental requirements of Article III are satisfied, there is no Constitutional bar to an appeal of an unsatisfactory judgment.

POINT I

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING A PARTY'S RIGHT TO APPEAL A DIVISIBLE PORTION OF AN ADVERSE JUDGMENT WHILE ACCEPTING THE BENEFIT OF A SEPARABLE AWARD.

When a court adjudicates separable claims, a party may accept the benefits of the claims on which it prevailed and appeal the separable claims that were decided against it. *Crawford v. Andrew Systems, Inc.*, 39 F. 3d 1151, 1153 (11th Cir. 1994).

The Circuit Courts agree on this rule. *See University of Rhode Island v. AW Chesteron Co.*, 2 F. 3d 1200, 1204 n. 7 (1st Cir. 1993); *Trusthouse Forte, Inc. v. 795 Fifth Ave. Corp.*, 756 F. 2d 255, 258-59 (2nd Cir. 1985); *Ashley v. Boehringer Ingelheim Pharmaceuticals*, 7 F. 3d 20, 25 (2nd Cir. 1993); accord *Dalle Tezze v. Director, Office of Worker's Compensation Programs, United States Dept. of Labor*, 814 F. 2d 129, 132-33 (3rd Cir. 1987); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F. 2d 120, 123 (4th Cir. 1992); *Lanier v. Sallas*, 777 F. 2d 321, 325 & n. 16 (5th Cir. 1985); *Tech Hills Eleven Assoc. v. Phoenix Home Life Mutual Ins. Co.*, 5 F. 3d 963, 970 (6th Cir. 1993); *First Nat'l Bank of Chicago v. Comptroller of the Currency of the United States*, 956 F. 2d 1360, 1363 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 93; *Byron v. Clay*, 867 F. 2d 1049, 1050 (7th Cir. 1989); *Denholm v. Houghton Mifflin Co.*, 912 F. 2d 357, 359 (9th Cir. 1990); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F. 2d

960, 962 (Fed. Cir. 1992), *on remand* 795 F. Supp. 453, *affirmed* 16 F. 3d 420; *see also Sealover v. Canada*, 806 F. Supp. 59, 60 (M.D. Pa. 1992).

Petitioner claims that the 10th Circuit has articulated a rule in contravention of the rule applied by the 11th Circuit; however, the 11th Circuit has categorically endorsed the general rule: a party may appeal a judgment in its favor provided "the judgment appealed from consists of two or more separate, distinct and unrelated parts . . .". *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F. 2d 483, 489 (11th Cir. 1990). In *Crawford v. Andrew Systems, supra*, the most recent 11th Circuit decision on the issue, the court stated that:

> "It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing along, amount to an accord and satisfaction of the entire claim"
>
> ***
>
> This circuit has addressed the issue only indirectly. In *Fidelcor Mortgage v. Ins. Co. of North America*, 820 F. 2d 367 (11th Cir. 1987), this Court applied the applicable Federal Common Law, looking to State law only to determine whether the portion of the judgment which was satisfied was distinct from the portion appealed. The Court accepted the principle that when a Court adjudicates separable or divisible controversies, the appealing party may accept the benefits of the divisible feature in his favor and challenge the portion adverse to him.

39 F.3d at 1153 (quoting *United States v. Hougham*, 364 U.S. 310, 312 (1960), *rehearing denied*, 364 U.S. 938 (1960)).

Petitioner misconstrues the 11th Circuit opinions on which it relies in asserting that certiorari should be granted to resolve the (imaginary) conflict between the 10th and 11th Circuits.

In *Wynfield Inns*, one of the 11th Circuit decisions on which petitioner relies, the court found that a plaintiff who accepted payment on a quantum meruit claim was barred from appealing an unfavorable directed verdict on its contract claim. The court determined that the two claims were indivisible--one could not recover for both, "such remedies being mutually exclusive and alternative measures of recovery" under state law. 896 F. 2d at 488-89.

Zaklama v. Mount Sinai Medical Center, 906 F. 2d 645 (11th Cir. 1990), the other 11th Circuit decision on which petitioner relies, is wholly inapposite. In *Zaklama*, the plaintiff in winning his employment discrimination suit prevailed on a single theory and received all that he had sought. His lawyers, however, after obtaining a writ of execution for the full judgment and filing satisfaction of final judgment, quarrelled with plaintiff over their fee arrangement.[1] After the District Court apportioned the award between plaintiff and his attorneys, the attorneys filed an untimely motion for fees. 906 F. 2d at 647. The 11th Circuit found that the motion was barred because it was untimely, and the appeal was barred because the attorneys had already executed on and accepted the portion designated for them by the District Court. Id. at 649-50.

Neither *Wynfield Inns* or *Zaklama* conflict with the 10th Circuit's decision in *Klein v. Grynberg*, 44 F. 3d 1497 (10th Cir. 1995). Respondents in *Klein* appealed the District Court's judgment N.O.V. as to the claim for breach of fiduciary duty. Respondents did not appeal the breach of

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1. That dispute is detailed in *Zaklama v. Mount Sinai Medical Center*, 906 F. 2d 651 (11th Cir. 1990).

contract claim, which is separate and divisible from the breach of fiduciary duty claim. The former sounds in contract, the latter in tort. *See Q.E.R., Inc. v. Hickerson,* 880 F. 2d 1178, 1182 (10th Cir. 1989) (citing *Restatement (2d) of Torts,* section 874 (1977); *Hill v. Bache Halsey Stuart Shields, Inc.,* 790 F. 2d 817 (10th Cir. 1986); *Security Nat'l Bank v. Peters, Writer and Christensen, Inc.,* 569 P. 2d 875, 880-81 (Colo. Ct. App. 1977). One may breach a contract without breaching a fiduciary duty and of course, the converse is true. In appealing the claim pertaining to breach of fiduciary duty--specifically, the District Court's judgment N.O.V.--the respondents, who had accepted their breach of contract awards, preserved their right to appeal the unfavorable judgment N.O.V. as to the breach of fiduciary duty.

Petitioner further argues that the respondents' unwilling acceptance of the $4.00 on the breach of fiduciary duty claim barred their appeal. This argument is unfounded. First, respondents' acceptance of the $4.00 was "under protest" and under the force of the ruling of the District Court which was appealed. Secondly, acceptance of payment of an unsatisfactory judgment, standing alone, does not bar an appeal of the entire claim. *United States v. Hougham,* 364 U.S. 310, 312 (1960); *Crawford,* 39 F.3d at 1153; *see also Electrical Fittings Corp. v. Thomas & Bets Co.,* 307 U.S. 241 (1939).

There is no conflict among the circuits on this issue, and the 10th circuit's decision in *Klein v. Grynberg,* far from being an anomaly, was a correct application of established and accepted precedent.

POINT II

FEDERAL LAW GOVERNS THE APPEALABILITY OF A JUDGMENT ENTERED IN A DISTRICT COURT HAVING DIVERSITY JURISDICTION.

This Court has already decided that the appealability of a judgment rendered by a federal district court is governed by federal law. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50 (1977) (citing *Hanna v. Plumer*, 380 U.S. 460, 466-69; and *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958)); *see generally* 6A *Moore's Federal Practice*, paragraph 59-08 [7] (1984).[2]

Since the issue is settled and the law is clear, this Court should deny the petition for certiorari on this question.

POINT III

THE COURT OF APPEALS WAS NOT DEPRIVED OF JURISDICTION UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF RESPONDENTS' EXECUTION ON THE JUDGMENT.

There was a case in controversy in which respondent, Henry Klein, had a direct stake, which case was appealed to the 10th Circuit. Petitioner, however, argues that by executing on the judgment (whether petitioner

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2. *Donovan*, which petitioner neglected to cite, also stated at 429 U.S. 649: "In federal court . . . the acceptance of a remittitur on one count of a complaint does not bar an appeal from an adverse judgment with respect to an entirely separate cause of action."

means the contract judgment or the $4.00 judgment for breach of fiduciary duty is unstated), respondents deprived the Court of Appeals of jurisdiction over the appeal under Article III, Section 2 of the Constitution. This Court, however, delivered an opinion pertaining to Article III that refutes Petitioner's argument. In *Deposit Guaranty Nat'l Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), *rehearing denied*, 446 U.S. 947 (1980), the Court stated:

> "Congress has vested appellate jurisdiction in the Courts of Appeals for review of final decisions of the district courts. 28 U.S.C. Section 1291 . . . A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it . . . The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does *not* have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.

445 U.S. at 333-34 (footnote and citations omitted) (emphasis added). The principle of law articulated by this case is well-settled and need not be reexamined.

CONCLUSION

For the reasons discussed above, the Petition for Certiorari should be denied.

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I. THE APPLICABILITY OF THE *ERIE* DOCTRINE TO QUESTIONS OF APPELLATE JURISDICTION REMAINS UNDECIDED AND UNRESOLVED.

The lower federal courts need Supreme Court guidance as to whether in diversity cases a uniform standard of mootness applies in all instances, or the law of the forum supplies the rule of decision under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Without considering the *Erie* question or citing any authorities which do, Respondents simply assert that federal law governs appellate questions, and thus must prevail here (*See, e.g.*, Klein Brief in Opposition, Points II and III). That argument is too facile: the cases cited by Respondent Klein arose as federal questions, so state law could not have been in issue. *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), addressed a Jones Act claim under 46 U.S.C. § 688, and *Deposit Guaranty Nat. Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), concerned the National Bank Act, 12 U.S.C. §§ 85, 86.[1] Nevertheless, both are somewhat instructive here.

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[1] *Donovan* holds that accepting a remitted verdict, despite protest, bars appeal, *Id.* at 648-49. That point parallels Petitioner's argument that even under federal law Respondents' acceptance of the breach of fiduciary duty damages should bar their efforts to increase that award, and that the Tenth Circuit incorrectly disposed of the matter. *Donovan* makes passing reference to diversity litigation, in dicta, when the Court indicates it would not apply state law on a question extraneous to the issue here, *i.e.*, the *size* of verdicts. In *Deposit Guaranty*, this Court reinstated a claim because the plaintiffs "never accepted the tender or judgment as satisfaction of their substantive claims." *Id.* at 1173. Here, the Respondents did embrace the judgment, taking affirmative steps forcibly to collect the award.

Donovan and *Deposit Guaranty* each differentiate between the federal law's purview with respect to questions of justiciability on the one hand and matters of appellate procedure on the other. *Deposit Guaranty* refers to

> the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal.

Deposit Guaranty, 445 U.S. at 335. The former should at times yield to local law, for where "one is barred from recovery in the state court, he should likewise be barred in the federal court." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). In diversity cases, a federal court is "in effect, only another court of the State." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108 (1945). Consequently, remedies not accorded by state courts should not be available to those who have access to a federal forum solely by virtue of their diverse citizenship. *See, Angel v. Bullington*, 330 U.S. 183, 192 (1947). For example, if a state statute of limitations terminates a claim, the federal courts must respect that result because, "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Guaranty Trust Co.*, 326 U.S. at 110.

This Court has yet to decide whether rules governing mootness and the voluntary waiver of appellate rights in state courts deserve the same deference accorded other

precepts of state law. In Colorado courts, the local acceptance of benefits rule would bring this litigation to an end.[2]

Consequently, if the *Erie* doctrine imports a state's litigation-ending principles into federal court, the Tenth Circuit was without jurisdiction to proceed. Petitioner asks this court to grant certiorari to address that open question.

II. RESPONDENTS DID NOT EXECUTE A "SEPARATE AND DIVISIBLE" PART OF THE JUDGMENT, AND THE CIRCUITS DISAGREE ON THE EFFECT OF EXECUTING A JUDGMENT ONE SEEKS TO APPEAL.

Respondents' arguments that one may accept the benefits of part of a judgment without jeopardizing his right to appeal a separate and divisible part, and that the acceptance of a tendered payment does not alone constitute an accord and satisfaction, rely on well-established but inapplicable rules. Respondents did not limit their collection efforts to a divisible part of the award, nor did

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[2] The Shomron Respondents argue to the contrary, but not persuasively. The case on which they rely, *Stenback v. Front Range Financial Corp.*, 764 P.2d 380 (Colo.App. 1988), barred the judgment debtor's appeal of an adverse judgment because of his "conscious and voluntary" acquiescence in the judgment, even in the face of judicial compulsion. *Id.* at 383. Here Respondents, the judgment creditors, appealed a favorable verdict as to which they took voluntary collection efforts even before the court order of which they complain. If anything, *Stenback* emphasizes Colorado's policy of ending the appeals of parties who voluntarily accept a judgment.

they accept a tender. They executed on the whole of the judgment, including the part attributed to breach of fiduciary duty. Respondents thereby embraced not only the part they chose not to appeal, the contract damages, but also the part they challenged, the award for breach of fiduciary duty.

Moreover, the Tenth Circuit's opinion here does not rest on the "separate and divisible" rule. Respondents raised this same argument below, but the court never addressed the point, apparently recognizing that it had no application under the facts of the case.

Respondents' appeal challenged evidentiary rulings directly related to the breach of fiduciary duty judgment on which they executed as well as the trial judge's disposition of the punitive damages awarded for that breach. Those contentions negate Respondents' current assertion that the part of the judgment they embraced can be divorced from the part they challenged. The evidentiary rulings inextricably underlie the principal claim, and punitive damages do not constitute a claim separate and divisible from the compensatory verdict. *Lanier v. Sallas*, 777 F.2d 321, 325-26 (5th Cir. 1985); *see also, Arizona St. Carpenters Pension Tr. Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990). Even the Eleventh Circuit case on which Respondents rely, *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987), recognized the inseparability of actual and exemplary damages, rejecting the very position Respondents now assert.

The question here is not whether the circuits agree on the rule that prevails when an appellant executes a part of a judgment separate and divisible from a part he appeals. Instead, the issue, not addressed by Respondents, is whether the circuits apply divergent and unreconciled rules about the consequences of executing on the same part of a judgment that one is appealing.

In *Fidelcor*, the Eleventh Circuit, applying the acceptance of benefits rule, dismissed an appeal because:

> It is well settled that when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives his right to appeal from an otherwise adverse judgment.

820 F.2d at 370. The Tenth Circuit never considered whether the Respondents' efforts to collect the breach of fiduciary duty judgment constituted acceptance of the award. Instead the court relied exclusively on *United States v. Hougham*, 364 U.S. 310 (1960), to dispose of this case, implicitly concluding that *Hougham* supplies the exclusive rule for waiver of appellate rights in the federal courts.

The rule of *Hougham* does not salvage Respondents' appeal because the contractual elements essential to the resolution in *Hougham* are absent here and because, as demonstrated in the following section, Respondents' acts of consequence were indisputably voluntary. The judgment creditor in *Hougham* did not pursue execution; Respondents did. The judgment debtor in *Hougham* tendered payment, Petitioner did not. If *Erie* does not mandate the application of Colorado's acceptance of benefits

rule in this case, then *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), not *Hougham*, articulates the governing federal rule.

By declining to recognize a purview for the acceptance of benefits rule, the Tenth Circuit Court of Appeals engendered irreconcilable conflict with the Eleventh Circuit. By ignoring *Dashiel*, the court turned its back on an established, if little known, Supreme Court decision. Certiorari should be granted to resolve the conflict and to determine *Dashiel*'s viability.

III. RESPONDENTS VOLUNTARILY ACCEPTED THE BENEFITS OF THE BREACH OF FIDUCIARY DUTY JUDGMENT.

Respondents' contention that they accepted the benefits of the fiduciary duty judgment under compulsion misstates the facts of record and perverts the applicable legal principles. Respondents acted unilaterally and freely in depriving Petitioner of his property. *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), establishes that the judgment debtor's loss of the property, not the judgment creditor's acquisition of it, extinguishes the debt. Indeed, in *Dashiel* this Court noted that "Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, . . . the debt is discharged" even if the creditor never receives the proceeds. *Id.* at 269.

The assertion, most succinctly stated at page 8 of the Shomron group's Brief, that "Respondents did not voluntarily pursue any legal measures to recover . . . the four dollars breach of fiduciary duty claim . . . " transparently

misrepresents the facts. The district court did not force Respondents to garnish Petitioner's accounts on both the contract and fiduciary awards, Respondents did so of their own accord on July 6 and 24, 1992, long before the September 2, 1992 Order that Respondents now claim compelled them to take the funds. (Appendix E, *infra.*) On July 21, 1992 and August 10, 1992, again well in advance of the Order in question, Respondents freely chose to move for judgment against the garnishees for enough of Petitioner's money to satisfy both the contract and fiduciary duty awards. [Aplee.Supp.App.Vol.I at 6-9, 5-15.][3] Their request was granted. They sought to withdraw those funds on August 18, 1992 and August 20, 1992, still before Petitioner asked the district court to intervene and order acknowledgement of satisfaction upon disbursement of the requested payments. [Aplee.Supp.App.Vol.I at 30-39.]

By the time the district judge ordered Respondents to file acknowledgements – the only coercive act to which Respondents can point – their incontrovertibly voluntary acts of garnishment, levy and execution had already deprived Petitioner of sufficient property to pay in full, with interest, both the contract and fiduciary duty judgments. Under *Dashiel's* rule, even as partially quoted by Respondents, (Shomron Brief at 8), the judgment was already extinguished before the judge ordered the filing of acknowledgements of satisfaction. Any remaining

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[3] Paragraph 1 of Respondents July 21, 1992 motion explicitly requests execution on $518,005, the entire judgment entered in Respondents' favor, including the breach of fiduciary duty award.

ambiguity or uncertainty dissolves when one considers the whole of *Dashiel's* rule, including the words omitted by Respondents' ellipsis: "When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt . . . is gone *although the creditor may not have been paid.*" 70 U.S. at 269 (emphasis supplied).

Respondent Klein shows similar disregard for the record. He would have this Court believe that the trial court set aside the breach of fiduciary duty award.[4] It did not. The jury awarded each of the Respondents one dollar on their fiduciary duty claims, and the Court entered judgment accordingly. (Petition, Appendix A at A-10, Appendix B at B-2.) The crux of the issue here is that Respondents willingly executed the breach of fiduciary duty judgment simultaneously with their appeal of it.

These facts belie Respondents' denial that they voluntarily pursued legal means to collect the judgment, and their empty protestations should not interfere with this Court's decision whether the issues presented warrant review.

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[4] Klein's Brief in Opposition refers to "The District Court's Judgment N.O.V. as to the claim for breach of fiduciary duty," at page 4 and again at page 5. The only part of the Jury's verdict set aside by the district court pertained to exemplary damages for the tortious conduct, an aspect of the case not before this court. Hearing on Posttrial Motions, June 24, 1992 at 109 [Aplee.Supp. App.Vol.II at 333]; (*See also* Petition, Appendix A at A-8).

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF BROAD APPLICATION IN FEDERAL LITIGATION.

Whether federal law or state law applied by the federal courts in diversity cases articulates the governing formulation of the acceptance of benefits rule, this matter has general importance to litigants and courts in the federal system. The rule, whatever its terms and however established, affects the appellate rights and decisions of all judgment creditors unhappy with the size of their awards.

These litigants, who must weigh the benefits of a judgment already won against the uncertainties and prospects of appeal, need to know whether they may execute on the judgment while appealing it. The courts that entertain these cases need to know the limits of their jurisdiction. And both the courts and the parties need to know whether the determinative rule resides in state or federal law. Only this Court can definitively articulate the applicable principles.

Respectfully submitted,

DONALD W. ALPERSTEIN
Counsel of Record

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SCOTT A. CLARK

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1600 Broadway, Suite 2350
Denver, Colorado 80202
(303) 894-8191

Counsel for Petitioner

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

(C.R.C.P.No. 32) (Filed July 6, 1992)

Case No. ~~84-S-2429~~ 84-S-1593

WRIT OF GARNISHMENT – JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

Gur Shomron, Amiram Grynberg and Defendisk, LTD., Plaintiff(s)

vs.

Jack J. Grynberg and Grynberg Petroleum Company Defendant(s)

Judgment Debtor's name, last known address, other identifying information: Grynberg Petroleum Company, 5000 South Quebec, Denver, Colorado 80237

1. Original Amount of Judgment Entered 3/31/92 Amount after Judgment 6-29-92 (date)		$ 518,005
2. Plus any Interest Due on Judgment (* % per annum)	+	$ 434,493 (through 6/29/92)
3. Taxable Costs (Including estimated cost of service of this Writ)	+	$ 240
4. Less any Amount Paid	-	$ -0-
5. Principal Balance/Total Amount Due and Owing	=	$ 952,738

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of 6/29/92 .
(date)

Subscribed under oath before me on 29 June 1992

/s/ Joyce D. Alden-Sawyer

Notary Public or Deputy Clerk

My Commission Expires: 31 May 1996

* 8% 6/27/84 to 3/31/92
4.58% 4/1/92 to 6/29/92

Gur Shamron, Amiram Grynberg and Defendisk, LTD.
(Print Judgment Creditor's Name)

Address: Grynberg Engineers, 7 Haarad St., Ramat Hachayal, P.O. Box 43252, TEL-AVIV 7 C 61430

By: /s/ Patrick D. Vellone
Signature (Type Name, Title, Address and Phone)
VINTON, WALLER, SLIVKA & PANASCI
BY: Patrick D. Vellone
1600 Stout Street,
Suite 1100,
Denver, CO 80202
Dan Crupain, Esq.,
Crupain & Greenfield
225 Broadway,
New York, NY 10007
Attorney's for Plaintiffs

WRIT OF GARNISHMENT

To The United States Marshal or to the Sheriff of any Colorado County, or to any person over the age of 18 years who is not a party to this action:

You are directed to serve a copy of this Writ of Garnishment upon Norwest Bank-Denver, 1740 Broadway, Denver Colorado 80274 . Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answers to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. YOUR FAILURE TO ANSWER THIS WRIT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To hold pending court order any personal property owed to or owned by the Judgment Debtor and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ applies to all personal property owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.

b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.

c. If you are ordered to pay funds to the Court, tender your check for the amount ordered PAYABLE TO THE CLERK OF THE U.S. DISTRICT COURT AT 1929 Stout St., Room C-145 Denver, CO 80294

JAMES R. MANSPEAKER
CLERK OF THE COURT

By: /s/ Debra Hansen
Deputy Clerk

(See Reverse Side)

Date: 6-30-92

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

(C.R.C.P.No. 29)

Case No. 84-S-2429 (84-S-1593)

WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY

Gur Shomron, Amiram Grynberg and Defendisk, Ltd.
Plaintiff(s)

vs.

Jack J. Grynberg and Grynberg Petroleum Company,
Defendant(s)

Judgment Debtor's name, last known address, other identifying information: Jack J. Grynberg, 4661 Dosa Drive, Cherry Hills Village, CO 80110

1. Original Amount of Judgment Entered 6/29/92 (date)		$ 518,004
2. Plus any Interest Due on Judgment (* % per annum)	+	$ 437,329 (through 7/24/92)
3. Taxable Costs (Including estimated cost of service of this Writ)	+	$ 1,400
4. Less any Amount Paid	-	$ -0-
5. Principal Balance/Total Amount Due and Owing	=	$ 956,733

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of 7/24/92 .
(date)

Subscribed under oath before me on 24 July 1992

/s/ Joyce D. Alden-Sawyer

Notary Public or Deputy Clerk

My Commission Expires: 31 May 1996

Gur Shamron, Amiram Grynberg and Defendisk, LTD.
(Print Judgment Creditor's Name)

Address: Grynberg Engineers, 7 Haarad St., Ramad Hachayal, P.O. Box 43252, Tel-Aviv 7-C61430

By: /s/ Margaret M. McClellan for:
Signature (Type Name, Title, Address and Phone)
Patrick D. Vellone
VINTON, WALLER, SLIVKA & PANASCI
1600 Stout Street,
Suite 1100
Denver, CO 80202
(303) 534-4499
Dan Crupain,
Crupain & Greenfield
225 Broadway,
New York, NY 10007

* 8% 6/27/84 to 3/31/92
4.58% 4/1/92 to 7/24/92

WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY

To The United States Marshal or to the Sheriff of any Colorado County, or to any person over the age of 18 years who is not a party to this action:

You are directed to serve a copy of this Writ of Garnishment upon Painewebber Incorporated. Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answers to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. YOUR FAILURE TO ANSWER THIS WRIT WITH NOTICE MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To hold pending court order any personal property (other than earnings) owed to or owned by the Judgment Debtor and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ with Notice applies to all personal property (other than earnings) owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.

b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.

c. If you are ordered to pay funds to the Court, tender your check for the amount ordered PAYABLE TO THE CLERK OF THE U.S. DISTRICT COURT AT 1929 Stout St., Room C-145 Denver, CO 80294

JAMES R. MANSPEAKER
CLERK OF THE COURT

(See Reverse Side)

JAMES R. MANSPEAKER
By: /s/ Duane Darrald
Deputy Clerk

Date: 7/24/92